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Supreme Court of the United States

OCTOBER TERM 1935

No. 377

ASA H. WHITFIELD, PETITIONER,

v.

THE STATE OF OHIO.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the Court of Appeals of Cuyahoga County, for the eighth district of the State of Ohio, is reported in 49 Ohio App. 530 (197 N. E. 605). The Supreme Court of Ohio dismissed without opinion the petition in error and denied a re-hearing. (R. 29) The order of the Supreme Court of Ohio is found in 129 Ohio St. 543 (196 N. E. 164).

Jurisdiction

The Supreme Court of Ohio dismissed on May 15, 1935, the petition in error filed by the petitioner (R.

29). An application for rehearing was filed on May 22 (R. 28) and was denied on May 29, 1935 (R. 28).

The petition for writ of certiorari was filed August 19 and was granted October 14, 1935 (R. 29). The statutory provision sustaining the jurisdiction of this court is contained in 28 USCA § 344.

Questions Presented

(a) Whether sections 2228-1 and 2228-2 of the General Code of Ohio, forbidding the sale on the open market in Ohio of prison-made goods, and imposing penalties for the violation thereof, are in conflict with Article 1, Sec. 8, Cl. 3 of, and with the Tenth and Fourteenth Amendments to, the Constitution of the United States and,

(b) Whether the Hawes-Cooper Act of Congress (45 Stat. at L. 1084, 49 USCA § 65), undertaking to withdraw from prison-made goods their interstate character upon their arrival and delivery in the several states, is authorized by Art. 1, Sec. 8, Cl. 3, or by any other provision of the Constitution.

Statutes Involved

The statutes involved are Sections 2228-1 and 2228-2 of the General Code of Ohio and the Hawes-Cooper Act of Congress. These are as follows:

> 2228-1. After January 19, 1934, no goods, wares or merchandise, manufactured or mined wholly or in part in any other State by con-

victs or prisoners, except convicts or prisoners on parole or probation, shall be sold on the open market in this State.

2228-2. Whoever violates any of the provisions of the next preceding section shall be fined not less than $25.00 nor more than $50.00 for the first offense and not less than $50.00 nor more than $200.00 for each subsequent offense. (Effective January 19th, 1934.)

The Hawes-Cooper Act:

Chap. 79.—An Act to divest goods, wares, and merchandise manufactured, produced, or mined by convicts or prisoners of their interstate character in certain cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all goods, wares, and merchandise manufactured, produced, or mined, wholly or in part, by convicts or prisoners, except convicts or prisoners on parole or probation, or in any penal and/or reformatory institutions, except commodities manufactured in Federal penal and correctional institutions for use by the Federal Government, transported into any State or territory of the United States and remaining therein for use, consumption, sale, or storage, shall upon arrival and delivery in such State or territory be subject to the operation and effect of the laws of such State or territory to the same extent and in the same manner as though such goods, wares, and merchandise had been manufactured, produced, or mined in such State or territory, and shall

not be exempt therefrom by reason of being introduced in the original package or otherwise.

Sec. 2. This Act shall take effect five years after the date of its approval.

Approved, January 19, 1929.

STATEMENT

On October 2, 1934, a warrant was issued out of the municipal court of Cleveland (R. 2, 3) under which the petitioner, Whitfield, was arrested and charged with unlawfully selling on the open market to one Kissack one dozen chambray men's work shirts, which had been manufactured in whole or in part by convicts or prisoners in Wetumpka Prison in the State of Alabama, who were not at the time of manufacturing the same on parole or probation. A second count charged the petititioner with unlawfully selling for shipment via railway express from Wetumpka prison in Alabama to Kissack in Lakewood, Ohio, six dozen chambray work shirts which had been manufactured in whole or in part by convicts or prisoners in Wetumpka Prison in Alabama, who were not at the time of manufacturing the same on parole or probation (R. 2).

The petitioner was tried under the warrant and found guilty on October 3 under both counts (R. 10).

The facts as stipulated (R. 7, 8) were as follows: The petitioner, as agent for the State of Alabama, had on October 2 sold to one Kissack in Cleveland,

on the open market, one dozen chambray men's work shirts for a consideration of $5.25, such shirts having been manufactured in whole by prisoners confined in Wetumpka Prison in the State of Alabama. The prisoners at the time of manufacturing such shirts were not on parole or probation. The shirts were shipped into the City of Cleveland via United States parcel post from Wetumpka Prison in Alabama, to be sold on the open market in Cleveland. The shirts were sold in the original package, as shipped by interstate commerce into Ohio. There was nothing harmful, injurious or deleterious about the goods sold.

The stipulation as to the second count differed from the stipulation as to the first count only in that Whitfield sold to Kissack on the open market in Cleveland, six dozen chambray shirts for $31.50, but that the shirts were not then delivered to Kissack, but Whitfield agreed to ship the same to Kissack at Lakewood, Ohio, via railway express, from Wetumpka Prison in Alabama (R. 7-8).

The petitioner objected to the introduction of any evidence for the reason that the warrant charged no offense. The objection was overruled and the petitioner excepted (R 7).

In his own behalf the petitioner testifed that the facts set out in the stipulation were substantially correct, that his defense was that the law as passed was "unconstitutional under the Federal Constitution" (R. 9), and that it violated the Federal Constitution (R. 10).

Upon the introduction of the evidence the petitioner moved that the warrant be quashed and the defendant discharged for the reason that the warrant did not show any offense on which the petitioner could be charged. The court overruled the motion and the petitioner excepted (R. 9).

The petitioner thereupon renewed his motion for the discharge of the petitioner which the court overruled, to which the petitioner excepted (R. 10).

On October 4 the petitioner filed a motion for a new trial in which he set out the following grounds:

1. That the court erred in overruling the demurrer filed by the defendant.

2. That the court erred in overruling defendant's objection to the introduction of any and all evidence.

3. That the court erred in overruling the defendant's motion for a directed verdict.

4. That the verdict is not sustained by sufficient evidence.

5. That the verdict is contrary to law.

6. That the verdict is contrary to the Constitution of the United States of America.

7. For other errors of law occurring at the trial, as indicated by the record (R. 4).

The court overruled the motion (R. 11).

Thereupon the petitioner filed a motion in arrest of judgment and for the discharge of the petitioner on the following grounds:

1. The warrant charges no offense.

2. The evidence shows that the offense with which the defendant is charged is a transaction in interstate commerce and beyond the power of the State of Ohio to regulate or control.

3. The evidence shows that the offense with which the defendant is charged is having in his possession for sale, merchandise in the original package and is a transaction in interstate commerce and beyond the power of the State of Ohio to regulate or control.

4. The evidence shows that the offense with which the defendant is charged is offering for sale merchandise in the original package and is a transaction in interstate commerce and beyond the power of the State of Ohio to regulate or control.

5. The activity in which the evidence shows the defendant is engaged is a transaction in interstate commerce, which the United States alone has the power to regulate or control.

6. The defendant is denied due process of law to which he is entitled under the Fourteenth Amendment to the Constitution of the United States of America.

7. The act of Congress known as the Hawes Cooper Act (45 Stat. at L., p. 1084, Ch. 79) under which the State of Ohio claims the power to arrest and prosecute the defendant on the grounds charged in the warrant, is invalid and unconstitutional and beyond the power of the Congress to enact.

8. That the evidence fails to show that there is anything injurious, harmful or deleterious about the goods sold.

9. That there is nothing injurious, harmful or deleterious about the goods sold (R. 5-6).

The court overruled the motion in arrest of judgment and for the discharge of petitioner, to which the petitioner excepted (R. 9).

The court sentenced the petitioner to a fine of twenty-five dollars and costs of the case, to which the petitioner excepted (R. 11). The petitioner filed his bill of exceptions (R. 11) which was allowed (R. 12).

In the court of appeals the assignment of errors was as follows:

1. The court below erred in overruling the motion for a new trial by the petitioner.

2. The judgment was contrary to law and against the weight of the evidence.

3. The court erred in overruling the demurrers of the petitioner.

4. The court erred in admitting evidence over the objections of the petitioner and to which exceptions were duly noted at the time.

5. The court erred in overruling the motion of the petitioner to direct a verdict at the close of the testimony in the court below.

6. The verdict was contrary to the Constitution of the United States.

7. The court erred in overruling the motion of the petitioner to quash the warrant issued out of the court below.

8. For other errors on the face of the record prejudicial to the rights of the petitioner (R. 14-15).

The court of appeals on February 18, 1935, on consideration of all the assigned errors, found that substantial justice had been done to the petitioner and affirmed the judgment of the municipal court (R. 16).

The petitioner on March 14, 1935, filed in the Supreme Court of Ohio a petition in error (R. 17) praying that the supreme court render the judgment which the two lower courts ought to have rendered (R. 19) and that petitioner in error be restored to all things he had lost by reason of such erroneous judgments, and for all proper relief in the premises. The petitioner set out that the court of appeals erred in finding no error in the trial in the municipal court and erred in affirming the judgment of the municipal court. The petitioner set out further that the municipal court erred (a) in overruling the motion of the petitioner to quash the warrant of arrest; (b) in overruling the motion of the petitioner for a new trial; (c) in rendering judgment and imposing sentence against him; (d) in overruling the motion for a directed verdict in his favor and for his discharge; (e) in overruling the demurrer of the petitioner; (f) in admitting evidence over the objections of the petitioner and to which exceptions were duly noted

at the time; (g) in overruling the motion of the petitioner to direct a verdict at the close of the testimony; and for other errors apparent on the record (R. 18, 19).

The petitioner further set out that the verdict was contrary to the Constitution of the United States (R. 19).

In its motion to certify the record the petitioner set out further that the cause of the petitioner presented a debatable quesion involving the Constitution of the United States (R. 20).

The supreme court on May 15, 1935, dismissed the petition, finding no debatable constitutional question involved (R. 29).

On May 22 the petitioner filed an application for rehearing (R. 23), setting out in the application that the record in the case raises the questions under the Constitution of the United States (a) of the right of Congress to divest itself of the right to regulate the interstate shipment of convict-made goods manufactured by convict labor in the various states of the Union; (b) of the right of Congress to divest such goods of their interstate character; and, (c) of the right of the general assembly of Ohio to enact Section 2228-1 of the Code of Ohio (R. 24).

The petitioner set out among other things that the Hawes-Cooper Act violated Article 1, Section 8, Clause 3 of, and the Tenth Amendment to, the Constitution of the United States; the petitioner contend-

ing that Congress, by divesting convict-made goods of their interstate character had unlawfully delegated its powers to the various state legislatures (R. 24).

On May 29, 1935, the supreme court denied the application for rehearing (R. 29).

In the opinion of the court of appeals the court sets out as the main contention of the petitioner (197 N. E. 605-606) the following:

> "Plaintiff in error relies mainly upon the contention that the judgment rendered by the trial court is contrary to the Constitution of the United States, and that section 2228-1, General Code, is likewise contrary to the Constitution of the United States, in that it violates article XIV, section 1, of the Amendments to the Federal Constitution, and also article I, section 8, clause 3 of the Federal Constitution." (p. 606)

In considering whether section 2228-1 of the General Code violated the 14th Amendment, the court compared the prison-made goods sold by the petitioner with the prison goods made in Ohio which were not permitted to be sold; concluding that since Ohio did not permit the products of its own prison to be sold, the fact that the petitioner was not permitted to sell like goods made in Alabama, was not a discrimination against him and consequently not a violation of the 14th Amendment.

As to the claimed conflict of section 2228-1 with the commerce clause, the court held that the Hawes-

Cooper Act resulted in placing convict-made goods which had been manufactured in another state, in the same class as convict-made goods manufactured in Ohio, and subject to the authority and control of Ohio. The court concluded that Congress had the power to

> "carry its regulation of interstate commerce to the point of prohibition of the interstate transportation of such articles as may spread evil or harm to the people of states other than the state of origin . . ."; (197 N. E. 608);

that Congress under its power to regulate interstate commerce, could place an article under the jurisdiction of the police power of a state upon its arrival in such state; and that as a result of the passage of the Hawes-Cooper Act, the State of Ohio was empowered to declare that the sale of prison-made goods in the open market would result in the destruction of the general welfare, prosperity and safety of the citizens of a state, saying:

> "It is a matter of common knowledge that industries employing free labor, required to pay taxes, interest on capital, and other items of overhead which are not included in the cost of prison-made goods, cannot compete successfully in the open market with prison-made goods and maintain the standard of wages which enables free labor to earn a decent living, or enables such industries to meet wage standards which have been established under national and state legislation. That prison-made goods can be sold in the open market at a price which is below the actual cost of production of manufacturers employing free labor is patent." (197 N. E. 608-9)

SPECIFICATION OF ERRORS

The Supreme Court of Ohio erred in rendering its judgment dated May 29, 1935 (R. 29) overruling petitioner's application for rehearing and in affirming the judgment of the court of appeals of the 8th district, resulting in a conviction of the petitioner under sections 2228-1 and 2228-2 of the General Code of Ohio, forbidding the sale of prison-made goods, such statutes having been enacted in pursuance of the Hawes-Cooper Act of Congress, which attempted to delegate to the legislature of Ohio the power to enact such statutes; the privileges or immunities of the petitioner, a citizen of Alabama and of the United States, being abridged by such state laws and the petitioner being deprived of property without due process of law, all as a result of such conviction, the statutes of Ohio violating Article 1, Section 8, Clause 3 of, and the 10th and 14th Amendments to, the Constitution of the United States; and the Hawes-Cooper Act not being a valid exercise of any of the powers of Congress.

SUMMARY OF ARGUMENT

The argument rests on two principal bases:

(1) In forbidding the sale of prison products in Ohio the law of Ohio is (a) in conflict with the interstate commerce clause in that it imposes a burden on an article of commerce which cannot be denominated an "outlaw of commerce"; (b) that it is in conflict with the Tenth Amendment in that, not being a police regulation, the law is an attempt on the part of Ohio to impose its own regulations on the government of the State of Alabama and on the petitioner Whitfield, its employee and agent; (c) that, being without constitutional basis, the law is in conflict with the Fourteenth Amendment in that (1) it discriminates against the petitioner Whitfield who is engaged in the sale of cotton shirts, and in favor of inhabitants of Ohio engaged in a like calling, and (2) deprives him of the right to follow the business of selling the articles forbidden by such law.

(2) The Hawes-Cooper Act of Congress is not a valid exercise of the powers of Congress to regulate interstate commerce. The goods, the movement of which Congress seeks in this instance to regulate, are neither harmful, injurious nor deleterious. The owners of the goods have a right to use the channels of interstate commerce to transport them from Alabama to Ohio, for such use is not a mere privilege to be extended or withdrawn by Congress. The framers of the Constitution and the people adopting it intended that commerce among the states should be

free and that neither Congress nor the states should have the power to impose an embargo among the states; the principal purpose in imposing on Congress the power to regulate commerce being to terminate the conflicting laws then existing among the colonies. The right of transportation includes the right of sale.

The purposes of the Hawes-Cooper Act are set out in the report of the Senate Committee considering the bill (supra, p. 52). These purposes are two: to terminate (a) the competition between prison labor and free labor, and the competition between the products manufactured in prisons and those manufactured outside prisons, and (b) to reform state prisons in the nation by terminating the contract method of using the labor of prisoners.

It is fundamental that the police powers of a state cannot be used to secure commercial advantages; that as to commerce the people of the United States are one people; that any commercial regulation attempted by Congress must bear a real or substantial relation to some part of interstate commerce.

It is, therefore, the contention of the petitioner that the combined asserted power of Congress and of the State of Ohio undertakes to achieve an end which is not authorized under the Constitution.

ARGUMENT

1.

THE LAW OF OHIO IN CONTROVERSY IS IN CONFLICT WITH THE POWER OF CONGRESS OVER INTERSTATE COMMERCE, AND THE HAWES-COOPER ACT FINDS NO PROPER BASIS IN THE CONSTITUTION.

A.

The Framers of the Constitution intended that Commerce among the States should be Free.

The following provisions of the Constitution indicate the manifest intention of the framers that the power of Congress over commerce among the states shall be advisory merely and asserted only to secure perfect freedom of trade and intercourse among the states:

> No tax or duty shall be laid on articles exported from any state (Art. 1, § 9, Cl. 5).
>
> No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from one state, be obliged to enter, clear, or pay duties in another (Art. 1, § 9, Cl. 6).
>
> No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: . . . . and all such laws shall be subject to the revision and control of the Congress (Art. 1, § 10, Cl. 2).

> No state shall, without the consent of Congress, lay any duty of tonnage. . . . (Art 1, § 10, Cl. 3).

In the *Passenger Cases* (1849), 48 U. S. (7 How.) 283, 12 L. ed. 702, Mr. Justice Wayne said that Article 1, Section 9, Clause 6

> "is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State shall enter the ports of another State." 414 (757)

This provision, he said, was intended to establish among the states

> "a perfect equality in commerce and navigation. That all should be alike, in respect to commerce and navigation, is an enjoined constitutional equality, which can neither be interrupted by Congress nor by the States . . ." 420 (759)

It will thus be seen that if a positive prohibition is placed on Congress in this regard, it would be extraordinary to assume that the Constitution was adopted containing the power on the part of Congress to give preference through one of its acts to the industries of one class of citizens as against the competition of others.

In *Ward v. Maryland* (1871), 79 U. S. (12 Wall.) 418, 20 L. ed. 449, the Court said that Art. 1, § 9, Cls. 5 and 6 and Art. 1, § 10, Cl. 3, were evidence to show that the framers of the Constitution intended to remove the evils of the lack of uniformity in commercial regulations which was one of the grievances of the citizens under the Confederation,

> "showing that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations . . . ." 431 (453)

In considering the dual powers of the states and the national government it is necessary to consider not only the context of the Constitution but the whole machinery of the government; and care must be taken in carrying out the fundamental principles, that the purpose of the framers is not frustrated. *License Cases* (1847), 46 U. S. (5 How.) 504, 519, 12 L. ed. 256, 263. It is obvious that the difficulties which the proponents of the Constitution faced would never have been overcome if the people of each state had felt that the power which they exercised over commerce with neighboring states, and which they were surrendering, would be seized by Congress and used for the same ends and purposes which resulted in the many conflicting regulations among the colonies.[1]

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[1]The problem of trade and commerce and the conflicts arising therefrom, began with the Declaration of Independence. That document declared, as one of the reasons for the action of the colonies, the act of the mother country in "cutting off our trade with all parts of the world."

B.

Clashing Sovereignty was sought to be avoided

Chief Justice Marshall said that under the form of government under which we live

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Upon the submission to the colonies of the Articles of Confederation, New Jersey in 1778 recommended that the exclusive power of regulating the trade of the United States with foreign nations, ought to be clearly vested in Congress (Journals of the Continental Congress, Vol. 11, p. 648).

The first suggestion made in Congress that the powers be strengthened so as to secure funds for the Confederation occurred on December 18, 1780 (18 J. C. C. 1162). A resolution introduced on that date was afterwards adopted, and on February 3, 1781 a resolution was adopted recommending to the several states that a five per cent. tax on imports be permitted to the United States (19 J. C. C. 112). It appeared that all the states had granted this power to Congress except Rhode Island and Georgia (23 J. C. C. 643). Rhode Island objected for the reason that it drew its chief support from commerce (23 J. C. C. 788).

Failing in its first attempt, Congress on April 18, 1783 made a further recommendation, itemizing the articles on which duties would be imposed and limiting the power of Congress to twenty-five years (24 J. C. C. 17-1, 257). This recommendation met the fate of its predecessor, seven states granting the power, other states either denying it or acceding to it in part only (30 J. C. C. 62-3).

A Committee of Congress submitted a report recommending that Article 9 of the Articles of Confederation be altered so as to delegate to Congress the power of regulating the trade of the states as well with foreign nations as with each other (28 J. C. C. 201).

The next step toward the regulation of commerce arose from the Madison resolution introduced on November 30, 1785

" . . . . We are relieved, as we ought to be, from clashing sovereignty; from interfering

in the House of Delegates of Virginia by Mr. Tyler, naming delegates to the Annapolis Convention. This included interstate as well as foreign commerce (Elliot's Debates[2], Vol. I, p. 147).

In the Convention of 1787 the regulation of commerce met with practically no resistance. The principal argument was whether Congress should be permitted to pass a commercial regulation without a two-thirds majority. On June 15, Mr. Patterson introduced a resolution providing for the regulation of trade and commerce both with foreign nations and among the states (House Document 398, 69th Congress, 1st Session, p. 205, Formation of the Union; herein sometimes referred to as H.D. 398). This power was doubtless intended to be contained in the proposal by Mr. Randolph submitted on June 19 to legislate in all cases in which the harmony of the United States may be interrupted by the exercise of individual legislation (H.D. 398, p. 201).

The adoption of the interstate commerce clause progressed without noteworthy comment. On August 6 it was reported without reference to the Indian tribes (H.D. 398, p. 475), the regulation of trade with Indians being added on August 22 (Ib. p. 595).

In his letter to Congress, Washington stated that the friends of the country had long seen and desired that the power of regulating commerce, among others, should be vested in the general government (H.D. 398, p. 1003).

Very few of the opponents to the constitution questioned the policy of imposing this power on Congress. Luther Martin in his address to the House of Delegates of Maryland seemed to have no objection to it (Elliott's Debates, Vol 1, pp. 382, 389). Messrs. Yates and Lansing said that this power should be delegated and yet the rights of the states reserved (Ib. 516, 517). Edmund Randolph who failed to sign the Constitu-

[2]References are to the second edition, 1836.

powers; from repugnancy between a right in one government to pull down what there is

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tion, in his report to the speaker of the House, noted that the thirteen legislatures viewed commerce under different points of view (Ib. pp. 518, 521). He had stated in the convention on June 16 that ". . . . Every one is impressed with the idea of a general regulation of trade and commerce. . . ." (H.D. 398, p. 776). Richard Henry Lee in his letter to Governor Randolph, dated October 16, 1787, expressed concern with the failure of the Convention to require a two-thirds vote in commercial matters (Elliot's Debates, Vol. I, pp. 544, 546).

In the state conventions the regulation of commerce was accepted with scarcely any debate. In Massachusetts, General Thompson, one of the opponents of the Constitution, was in favor of giving Congress power "only to regulate trade." (Elliot's Debates, Vol. II, p. 99). In Connecticut, Oliver Ellsworth referred to the tributes paid to neighboring states, which would end under the new Constitution (Ib. p. 192). In New York, Mr. Lansing commented that all the states except two had passed laws to enable Congress to regulate commerce, and these two were not indisposed to vest that power (Ib. p. 220). In the Virginia Convention, Randolph on June 6, 1788 referred to the reprisals among the states (Elliot's Debates, Vol. III, p. 104). Patrick Henry, probably the foremost opponent of the Constitution, referred to the conflicts between New York, New Jersey and Connecticut, as a result of which the latter two states paid the particular taxes of New York (Ib. p. 169). Messrs. Monroe and Grayson, opposing the adoption, were in favor of the regulation (Ib. pp. 214, 271).

In North Carolina, the commerce clause was read without observation by any member of the convention (Elliot's Debates, Vol. IV, p. 113). In South Carolina, only Charles Pinckney referred to the interfering regulations among the States (Ib. pp. 249, 250).

The Federalist indicates no opposition to the measure, re-

an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is right in another to preserve; . . . " [*McCulloch v. Maryland* (1819), 17 U. S. (4 Wheat.), 316, 430 (4 L. ed. 579, 607)].

The argument now presented to this court is not new. In the *License Cases,* supra, counsel for the plaintiff Pierce, inquired if one of the wool-growing states could prohibit the introduction of cotton into its limits on the ground that it was more healthful for their citizens to be clad in woolens than in cotton garments? If the use of tea and coffee might not be likewise forbidden? Or the use of animal food? Or could a state engage in the whale fishery to prohibit the introduction of tallow candles? 562 (282)

It is not reasonable to suppose that the framers of the Constitution and the coventions which adopted it never intended to give Congress the power by regulating commerce to give preference to the industries

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ferring to the fruitful source of contention then existing (The Federalist, No. 7 by Hamilton, pp. 45, 46).

See also *No. 11* (Ib. pp. 76-7), *No. 22* (Ib. pp. 141-2) and *Nos. 42 and 45* by Madison (pp. 288-290, 319).

The conventions of the several states proposed a total of ninety-seven amendments. These may be classified into sixty-five different subjects of which only three relate in any way to commerce. Two of these proposed by Virginia and North Carolina provide that commercial treaties should not be ratified without the consent of two-thirds of the Senate (Elliot's Debates, Vol. III, p. 594, No. 7, Ib. Vol. IV, p. 241, No. 7). This subject had been debated in the convention (Farrand, Vol. II, p. 449).

of entire states over those of other states? If so, the representatives in Congress of the most populous states could by combining their forces pass such laws having for their object the protection of industrial activities from the competition by those of other states.[3]

In *Adair v. United States* (1908), 208 U. S. 161, 52 L. ed. 436, the Court repeated that the power to regulate

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North Carolina suggested a further amendment to Article I, Section 9, Clause 5, providing that vessels bound from one state to another should not be required to enter or pay duties or to clear from a third state (Elliot's Debates, Vol. IV, p. 243, No. 23). Pennsylvania wished this provision explained (Ib. Vol. II, p. 504, No. 9).

The outline of the Pinckney plan of the constitution contains a provision (12) that "each state may lay Embargoes in Time of Scarcity." (Farrand, Vol. II, p. 135).

History shows that no consideration was given in the several conventions to the possibility of the imposition of an embargo by any one of the states or by Congress. It is evident that such a situation was not feared.

[3]In an analysis of several of the leading cases, Senator Goff of West Virginia pointed out in the debate on the validity of the Hawes-Cooper Act, that

> ". . . . It enables 13 of the States to keep out from their borders, or what is in effect the same, to subject to prohibitive enactments, articles manufactured and having their origin in the other 35 States, not because those articles are in themselves harmful or deleterious, but because they are manufactured by a class of labor that the 13 States do not approve of."

(Congressional Record, 70th Congress, 2nd Session, December 19, 1928, Vol. 70, Pt. 1, p. 859)

interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution [180 (445)].' The petitioner, Whitfield, is denied his fundamental right as a citizen of Alabama to serve his employer as best he can, so long as he does nothing that is reasonably forbidden by law as injurious to the public interests. This the Court said was a right held by Adair. [Ib. 172 (441)]. Among those fundamental rights under the Fourteenth Amendment to which the petitioner is entitled is the privilege and immunity of citizens in Ohio to sell chambray work shirts. This right does not depend on the determination of the legislature of Ohio that the products manufactured by its prisoners shall not be sold on the public market. Chambray is a gingham woven with colored warp and with filling yarns. The fact that cotton shirts are sold in Ohio may be accepted by the court as a matter of common knowledge.

There was introduced at the hearings before the Committee on Interstate Commerce of the United State Senate, 70th Congress, First Session, on Senate Bill 1940 (being the same as H. R. 7729 as passed except that the latter excepts from its provisions goods manufactured in federal prisons) that in 1923, the latest year for which information was available, the prisons of Ohio had manufactured work shirts and overalls for state use in the total amount of $250.053 (p. 68).

In *Ward v. Maryland,* supra, the court said that Ward, a citizen of New Jersey, might

> "lawfully sell, or offer or expose for sale . . . any goods which the permanent residents of the State

> might sell, or offer or expose for sale . . . . without being subjected to any higher tax or excise than that exacted by law of such permanent residents." 430 (452)

In *Hammer v. Dagenhart* (1918), 247 U. S. 251, 62 L. ed. 1101, the Court declared that the Child Labor Act (39 Stat. at L. 675. ch. 432) did not in effect regulate transportation among the states but aimed

> "to standardize the ages at which children may be employed in mining and manufacturing within the States. . . ." 272 (1105)

The act of Congress was in a two-fold sense repugnant to the constitution. It transcended the power of Congress over commerce and exerted a power as to a purely local matter to which the federal authority does not extend. 276 (1107)

C.

Police Powers of the States Cannot be used to Secure Commercial Advantages

The police powers of the states may of course be exercised when necessary for the preservation of the morals, the health or safety of the community, but the Court has declared in substance in many instances that

> "this exigency is not to be founded on any notions of commercial policy . . ."

[Mr. Justice McLean's opinion in the *License Cases*, supra, 593 (296)]

In *Brown v. Maryland* (1827), 25 U. S. (12 Wheat.) 419, 6 L. ed. 678, the Court said that

> "from the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. . . ." 438 (685)

The Court said that the states were restrained from imposing duties because

> "the interests of all would be best promoted by placing that whole subject under the control of Congress." 439 (685)

In *Veazie v. Moore* (1852), 55 U. S. (14 How.) 568, 14 L. ed. 545, the Court said that the design and object of the power of Congress over interstate commerce

> "as evinced in the history of the Constitution, was to establish a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain. . . ." 574 (548)

In *Hammer v. Dagenhart*, supra, the Court declared that no power was vested in Congress to require the

states to exercise their police power so as to prevent possible unfair competition; that many causes might cooperate to give one state an economic advantage over others, and that the commerce clause was not intended to give to Congress a general authority to equalize such conditions; that business done in some states may be at an economic disadvantage when compared with that in other states, but that this fact does not give Congress power

> "to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other States and approved by Congress." 273 (1106)

If Congress cannot deny transportation under such circumstances as arose in the Child Labor Case it cannot deny transportation to goods manufactured in prisons; for if the right attempted to be exerted under the Hawes-Cooper Act actually exists there is no limit to its exercise and Congress may bar transportation in such goods.

> ". . . Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed . . . ."—Brown et al v. Maryland, supra, 439 (686)

In *Baldwin v. Seelig* (1935), 294 U. S. 511, 79 L. ed. 1032, decided March 4, 1935, the Court again consid-

ered the power of the state to impose restrictions on the sale of goods in interstate commerce. Under its Milk Control Act the State of New York undertook to fix the price at which milk imported from Vermont into New York should be sold. This Court announced that New York was without power to prohibit the introduction within her territory of milk of wholesome quality acquired in Vermont, whether at high prices or at low ones. Indeed, this principle appeared not to be disputed. Yet in spite thereof, New York asserted her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that had been paid for it to the farmers of Vermont was less than would be owing in like circumstances to farmers in New York. In the case at bar the court of appeals of the eighth district of Ohio declared as a matter of common knowledge that industries employing free labor, required to pay taxes, interest on capital, and other items of overhead which are not included in the cost of prison-made goods, could not compete successfully in the open market with prison-made goods and maintain the standard of wages which enabled free labor to earn a decent living, or enable such industries to meet wage standards which had been established under national and state legislation. It announced that it was patent that prison-made goods could be sold in the open market at a price below the actual cost of production of manufacturers employing free labor.

In *Baldwin v. Seelig,* supra, this Court said that such a power as claimed by New York, if exerted,

> "will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. . . . Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art I, § 8, Clause 3. 'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.' [citing cases] Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis. . . ." 521-2 (1037-8)

The Court refers to the economic conditions prior to the adoption of the Constitution. A glance at the laws of the several colonies shows that all had enacted measures intended to protect their commerce from that of their neighbors.[4]

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[4]An impost duty on nails, looking glasses, china, glass, earthern and stone ware, etc., amounting to five per cent. and an impost duty of two and one-half per cent. on other goods, wares and merchandise imported into the state was imposed. (Laws of New Hampshire, Volume 4, 1784, p. 562)

The exportation of rum, wine, spirits, etc., after Septem-

". . . The next step would be to condition importation upon proof of a satisfactory wage scale in factory or shop, or even upon proof of the profits of the business. Whatever rela-

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ber 23, 1779, was forbidden. (Acts of the Session begun at Boston, September 8, 1779, pp. 1114-15)

An Act laying an embargo. (Described as a retaliatory act against Connecticut and Massachusetts.—Rhode Island Acts and Resolves, September 1779-February 1780, p. 9)

An Act for levying and collecting a Duty on certain Articles of Goods, Wares and Merchandise imported into this State by Land or Water. (Connecticut Acts and Laws, May 1784, p. 271)

An Act imposing Duties on the Importation of certain Goods, Wares, and Merchandise. (Laws of New York, 7th Session, 1784, Chapter 10, p. 11)

An act to lay a duty on foreign barley and malt imported into this state. (Pennsylvania Stat. at L., 1788, Vol. 13, p. 57) The reason of the law is set out and is to the effect that the importation of considerable quantities of foreign malt reduces the price of native barley and discourages the raising of the latter, and that therefore it is expedient to give due encouragement and preference to agriculture and manufacturers of Pennsylvania.

To prevent the waste of timber a duty is laid on all pipe and hogshead staves exported out of New Jersey to any of the neighboring colonies. (Laws of New Jersey, Volume 1, 1780, Chapter 9, p. 16)

An Act to prohibit the Exportation of Provisions from this State beyond the Seas, for a limited Time. (Delaware Laws, 1778, p. 3)

So serious had become the conflicts between Virginia and Maryland that the two states entered into a compact to regulate and settle the jurisdiction and navigation of the Potomac and Pocomoke Rivers, and that part of Chesapeake Bay

tion there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. [citing cases] One state may not put pressure of that sort upon others to reform their economic standards. If farmers or manufacturers in Vermont are abandoning farms or factories, or are failing to maintain them properly, the legislature of Vermont and not that of New York must supply the fitting remedy." 524 (1039)

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lying within the territory of Virginia. (Laws of Maryland, 1785, Volume 2, Fol. 584)

An act for laying an embargo on Salt and for other purposes. (Hening's Stat. at Large, Virginia, 1779, Vol. 10, p. 149)

It is interesting to note that the legislature of Virginia later adopted a resolution as follows:

". . . But it cannot be conceded that the power given to congress to regulate commerce among the several States,—a power intended to prevent the products and merchandise of one state, from being subject to injurious and vexatious burdens in another, can be fairly construed to authorize a total inhibition of the sale of such products and merchandise within the limits of a state to which they did not belong. . . ." (Laws of Virginia, 1819-20, p. 119)

An Act to prohibit the Exportation of Beef, Pork, Bacon, and Indian Corn. (Iredell—Laws of North Carolina, 1778, p. 356)

An act for levying and collecting certain duties and Imposts therein mentioned, in Aid of the Public Revenue, etc. (1783) (South Carolina Public Laws, 1682-1790, p. 340)

An Act to prohibit for a certain Time the Exportation of Indian Corn. (Colonial Records of Georgia, Volume 19, pp. 140, 1770)

The court of appeals bases Ohio's rejection of the goods from Alabama in part on the wage scale and the profits of the business. (197 N. E. 608-9)

D.

Neither Congress nor the States have the power to impose an Embargo among the States.

Congress is without power to impose an embargo which will affect only a part of the states. *Groves v. Slaughter* (1841), 40 U. S. (15 Pet.) 449, 506, 10 L. ed. 800, 821. In Mr. Justice McLean's concurring opinion, he said that

> "... The power vested in Congress to regulate commerce among the several States was designed to prevent commercial conflicts among them. ... Ohio could not proscribe the productions of the south, nor the fabrics of the north, ..." 507-8 (822).

In the *Passenger Cases*, supra, the Court said that to permit a state to impose a tax on interstate passengers on a steamboat or on a railroad

> "would enable a State to establish and enforce a non-intercourse with every other State." 407 (754)

And in *Crandall v. Nevada* (1867), 73 U. S. (6 Wall.) 35, 18 L. ed. 745, the Court declared that if the states could tax a railroad passenger

> "one or more States covering the only practicable routes of travel from the east to the west, or from the north to the south, may totally prevent or seriously burden all trans-

> portation of passengers from one part of the country to the other." 46 (748)

In *State Freight Tax* (1873), 82 U. S. (15 Wall.) 232, 21 L. ed. 146, the Court declared that if the states were permitted to tax persons or property passing through them by levying a tax upon their transportation, the result would be that

> "commercial intercourse between States remote from each other may be destroyed. . . " 280 (163)

Railroad Company v. Husen (1877), 95 U. S. 465, 24 L. ed. 527, is an apt illustration of the attempt of a state to exclude the products of other states. An act of Missouri excluded Texan, Mexican or Indian cattle from the state between March 1 and November 1 of any year; provided that transportation owners should be responsible for all damages resulting from a disease called the Spanish or Texas Fever, should the same occur along the line of such transportation. The act was not a police regulation as it did not require an inspection. No distinction was made between diseased cattle and such as were not diseased. The court declared that such a statute was beyond the power of a state to enact, that to hold otherwise would be to ignore one of the leading objects which the Constitution was designed to secure. 473 (531)

And in *Mobile v. Kimball* (1881), 102 U. S. 691, 26 L. ed. 238, it is stated that without the power of Congress to regulate interstate commerce there would

be no security against conflicting regulations of different states.

> "each discriminating in favor of its own products and citizens, and against the products and citizens of other States." 697 (239)

In *Schollenberger v. Pennsylvania* (1898), 171 U. S. 1, 43 L. ed. 49, a law of Pennsylvania forbade the sale of oleomargarine as an article of food. Congress in 1886 had recognized the article as a proper subject of taxation and as one which was the subject of traffic and of exportation to foreign countries and importation from such countries. Its manufacture was recognized as a lawful pursuit, and taxation was levied upon the manufacturer of the article, upon the wholesale and retail dealers therein, and also upon the article itself. The Court said that oleomargarine, if properly and honestly manufactured, was conceded to be a healthful and nutritious article of food; and the fact that it may be adulterated would not afford a foundation absolutely to prohibit its introduction in the state. 15 (54)

The general rule to be deduced from the decisions of the Court was

> "that a lawful article of commerce cannot be wholly excluded from importation into a State from another state where it was manufactured or grown. A State has power to regulate the introduction of any article, including a food product, so as to insure purity of the article imported, but such police power does not include the total exclusion even of an article of food." 12 (53)

Oleomargarine being a legitimate subject of commerce among the states, no state had a right totally to prohibit its introduction in its pure condition from without the state under any exercise of its police power. As a matter of state policy a state could determine whether to permit in many cases the manufacture and sale of articles within the state, or entirely to forbid such manufacture and sale

> "so long as the legislation is confined to the manufacture and the sale within the state." 16-17 (55)

The Court declared that when Congress taxes an article and recognizes it as a proper subject of commerce, a state could not totally exclude it because the state might choose to decide that for the purpose of preventing the importation of an impure or adulterated article the state would not permit the introduction of the pure and adulterated article within its borders upon any terms whatever. 19 (56)

Congress recognizes that cotton goods form a legitimate article of commerce. It has undertaken in the Agricultural Adjustment Act (48 Stat. 31, 7 USCA § 601, et seq.) to impose a processing tax on the manufacture of such goods. Congress having recognized that the states may be engaged in the manufacture of goods from the commodities, including cotton, regulated in the Adjustment Act, provided in the amendment that processings which are exempt from tax by reason of the fact that such processings "are done by or for a State, or a political subdivision or an institution thereof", shall be

imposed on other processors so as to effect the parity sought under the Adjustment Act. [Amendment of August 27, 1935, § 9 (b) (1) (B)]

So, with one hand Congress by the Hawes-Cooper Act undertakes to permit states to outlaw the sale of cotton work shirts and with the other extends to the states the privilege of manufacturing them free from the processing tax.

A law of a state prohibiting the sale of oleomargarine as a substitute for butter unless it is of a pink color, was held invalid as being in necessary effect prohibitory. The Court declared that the permission to sell when accompanied by the imposition of a condition which, if complied with, would "effectually prevent any sale, amounts in law to a prohibition." *Collins v. New Hampshire* (1898), 171 U. S. 30, 34, 43 L. ed. 60, 61.

The states may not burden instruments of interstate commerce by

> "forbidding the introduction into the State of articles of commerce generally recognized as lawful, ..." *Houston and Texas Central Railroad Company v. Mayes* (1906), 201 U. S. 321, 328, 50 L. ed. 772, 775.

United States v. Delaware & Hudson Co. (1909), 213 U. S. 366, 53 L. ed. 836, grew out of the commodity clause of the Hepburn Act, prohibiting railroad companies engaged in interstate commerce from transporting certain articles or commodities manufactured, mined or produced by them, or in which they have any proprietary interest, except as might be necessary for their own

use in the conduct of their business as common carriers. The Court upheld the power of Congress to enact the law but stated that it did not rest such power

> "upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the States of lawful commodities . . ." 415 (852)

In considering the Webb-Kenyon Act (37 Stat. at L. 699) the Court made it plain that the exceptional nature of intoxicating liquors was the basis upon which the exceptional power exerted must rest and afforded no ground

> "for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace." *Clark Distilling Company v. Western Maryland Railway Company and West Virginia* (1917), 242 U. S. 311, 332, 61 L. ed. 326, 341.

In *Hammer v. Dagenhart,* supra, the Court declared that the power of Congress to regulate interstate commerce was to control the means by which commerce is carried on,

> "which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities . . ." 269, 270 (1105)

In discussing the difference between the regulation of foreign commerce and that among the states, in *Atlantic Cleaners & Dyers v. United States* (1932), 286

U. S. 427, 76 L. ed. 1204, the Court declared that in the regulation of foreign commerce an embargo is admissible

> "but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states . . . ." 434 (1208)

The Supreme Court of Ohio has heretofore declared that the state had no power to pass a law requiring a dealer in prison-made goods to obtain a license from the secretary of state before selling such goods. *Arnold v. Yanders* (1897), 56 Ohio St. 417, 47 N. E. 50). The court held that it was

> "not competent for a state legislature to declare that convict-made goods are not articles of traffic and commerce, and then to act upon such declaration, and discriminate against such goods, or exclude them from the state by unfriendly legislation. . . ." 51

The basis of the opinion of the court was that Congress has the power to declare any article an outlaw of commerce; whereupon the states are permitted to treat the article as if produced within its borders. This is clearly an erroneous conception of the powers of Congress.

E.

Interstate Commerce Embraces the Sale of Goods after they reach their Destination

Without the right to sell an article in interstate commerce, the article is deprived of a part of, if not all, its value. In *Crandall v. Nevada,* supra, the Court said that if the right of a citizen to pass through a state is one guaranteed to him by the Constitution, such right must be as sacred from state taxation as the right derived by the importers from the payment of duties "to sell the goods on which the duties were paid." 47 (748)

In *State Freight Tax,* supra, the Court stated that it would be absurd to suppose that the transmission of the subjects of trade from the state to the buyer or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the states. 275 (161)

The City of Titusville, Pennsylvania, adopted an ordinance requiring agents soliciting orders of persons other than manufacturers and licensed merchants, to take out a license and pay therefor. The Court stated that if the state could tax for the privilege of selling to one class it could for selling to another or to all; that in either case the tax was a restriction on the right to sell and a burden on lawful commerce between the citizens of two states; that it was as much a burden upon commerce to tax for the privilege of selling to a minister as it is for that of selling to a merchant. The Court commented that the

pictures and picture frames which the defendant was engaged in selling were open to no condemnation and were "unchallenged subjects of commerce." *Brennan v. Titusville* (1894), 153 U. S. 289, 298, 38 L. ed. 719, 721

In *Houston and Texas Central Railroad Company v. Mayes,* supra, the Court said that states may not burden instruments of interstate commerce by prohibiting the sale of articles recognized as lawful after their introduction, commenting that this question, among others, has been

> "so frequently settled that a citation of authorities is unnecessary. . . ." 328 (775)

Commerce does not end with the transportation of goods

> "but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. . . . " *Dahmke-Walker Milling Company v. Bondurant* (1921), 257 U. S. 282, 290, 66 L. ed. 239, 244.

F.

The Right of the Citizen to engage in Commerce is not a Privilege granted by Congress

The power to regulate commerce does not impose on Congress the power to close the channels of commerce. The privilege of interstate commerce is not granted by the people to Congress. It is one of the rights retained by them, subject merely to regulation. In instances

where such regulation is necessary or proper for the protection of interstate commerce, Congress is empowered to use what may be termed its police power in connection therewith.

Answering the assertion in *The Employers' Liability Cases* (1908), 207 U. S. 463, 52 L. ed. 297, that because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of commerce, the Court said that to state such a proposition was to refute it; that it assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, or in other words, with the right to legislate concerning matters of purely state concern; that such an assertion rested upon the conception that the Constitution

> "destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. . . ." 502 (311)

Such a contention was declared by the court not to be well founded. What the framers of the Constitution undertook to do was

> " . . . to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the national interest may demand . . . " *The Minnesota Rate Cases* (1913), 230 U. S. 352, 398, 57 L. ed. 1511, 1540-1.

The conviction of the necessity of imposing upon Congress the regulation of interstate commerce

> "sprang from the disastrous experiences under the Confederation when the States vied in discriminatory measures against each other . . ." Ib. 398 (1540-1)

G

Congress can Exercise Police Powers in Interstate Commerce only on "Outlaws of Commerce."

The power through which Congress has heretofore undertaken to prohibit the use of the instruments of interstate commerce has been in the nature of a police power and has been limited to what have been denominated "outlaws of commerce." *Hoke and Economides v. United States* (1913), 227 U. S. 308, 323, 57 L. ed. 523, 527. In *Hipolite Egg Company v. United States* (1911), 220 U. S. 45, 55 L. ed. 364, the Court stated that it must be remembered that the Court was dealing with

> "illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration and which law punishes them (if we may so express ourselves) and the shipper of them . . ." 57 (368)

In the case at bar the law does not undertake to libel the goods nor to punish the State of Alabama as the shipper. If an article be debased by adulteration, or misrepresented by false branding, Congress may exercise

its prohibitive power. *Hoke and Economides v. United States,* supra, 322 (527).

It could not be disputed that if Congress had prohibited the shipment of all intoxicants in the channels of interstate commerce and therefore had prevented all movement between the several states, such action would have been lawful.

> " . . . The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the Constitution but for the enlarged right possessed by government to regulate liquor, has never that we are aware of been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guaranties such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, . . . " *Clark Distilling Company v. Western Maryland Railway Company and West Virginia,* supra, 332 (341).

The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses is no longer open to question.—*Caminetti v. United States* (1917), 242 U. S. 470, 491, 61 L. ed. 442, 455. There is a difference

> "between the much greater power of regulation which may be exerted as to liquor and that which may be exercised as to flour, dry-goods and other commodities. It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit lottery tickets and by the obvious consideration that such right to prohibit could not

> be applied to pig iron, steel rails, or most of the vast body of commodities." *Wilson v. New, et al.* (1917), 243 U. S. 332, 347, 61 L. ed. 755, 733.

In regulating interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin, Congress is "merely exercising the police power, for the benefit of the public, within the field of interstate commerce." *Brooks v. United States* (1925), 267 U. S. 432, 436-7, 69 L. ed. 699, 701.

In *Baldwin v. Seelig,* supra, the Court stated that there is little, if any, analogy between restrictions as to intoxicating liquors and as to milk.

> " . . . In licensing or prohibiting the sale of intoxicating liquors a state does not attempt to neutralize economic advantages belonging to the place of origin . . . ." 528 (1041)

H

A State Cannot Prevent the Shipment from that State of an Article produced within its Borders.

In two cases this Court has declared that no state may enforce a law forbidding the transportation from the state of a legitimate subject of commerce. *Haskell v. Kansas Natural Gas Company* (1912), 224 U. S. 217, 56 L. ed. 738. In *Pennsylvania v. West Virginia* (1923), 262 U. S. 553, 67 L. ed. 1117, the question was likewise whether a state could withdraw a natural re-

source from interstate commerce. The Court again announced the purpose of the interstate commerce clause which was

> "to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the States have assented to it, all are alike bound by it and all are equally protected by it . . ." 596 (1132)

It was held that a state law, whether of the state where the gas was produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce and a prohibited interference. 596-7 (1132)

I

The Power to Regulate Commerce was Imposed on Congress in order to avoid Conflicting State Laws.

The object of vesting in Congress the power to regulate commerce among the states was to insure uniformity of regulation "against conflicting and discriminating state legislation." *Mobile v. Kimball,* supra, 697 (239), Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of these evils. *Houston, East and West Texas Railway Company v. United States* (1914), 234 U. S. 342, 350, 58 L. ed. 1341, 1347-8.

J

As to Commerce the People of the United States are one People.

Commerce among the states is a unit, and in respect of that commerce this is one country, and we are one people. *United States v. Knight Co.* (1895), 156 U. S. 1, 32, 39 L. ed. 325, 336.

The Constitution

> "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig,* supra, 523 (1038).

K

The Regulation attempted by Congress must bear a real or substantial relationship to some part of Interstate Commerce.

The power of Congress to regulate interstate commerce does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce. *Second Employers' Liability Cases* (1912), 223 U. S. 1, 47, 56 L. ed. 327, 345; *Adair v. United States,* supra, 178 (444). In these cases, the attempted exercise by Congress of the power to regulate the liability of interstate carriers for injuries occurring in intrastate commerce and to forbid the discharge of an

employee of an interstate carrier because he had joined a labor union respectively, was held to lack any real or substantial relation to interstate commerce. How much more distantly removed from such relationship is the sale in Ohio of cotton goods made in the prisons of Alabama?

2.

THE ATTEMPTED ENFORCEMENT OF SECTIONS 2228-1 AND 2228-2 OF THE GENERAL CODE OF OHIO, AIDED BY THE HAWES-COOPER ACT, IS VIOLATIVE OF THE TENTH AMENDMENT.

The State of Alabama through its agent Whitfield, the petitioner, has undertaken to sell in Ohio part of the products of its cotton mills which are being operated by prisoners. The law of Ohio forbids the sale of such goods on the ground that prison labor is used in their manufacture. It is obvious that if free labor were used in the manufacture of cotton goods in mills owned by the State of Alabama, Ohio would have no objection to the sale of such products within its borders. Alabama is therefore required, if the Hawes-Cooper Act and the law of Ohio are valid, to reconstruct its system and, if it desires to sell its products in Ohio, to employ free labor only. In the *Child Labor Case* the Supreme Court said that the Act of Congress forbidding interstate commerce in the products of child labor (39 Stat. at L. 675) was not a proper regulation of interstate commerce and also

violated the Tenth Amendment. If the Hawes-Cooper Act (as does the Act of Congress of July 25, 1935)[5] prohibited interstate commeree in prison products, this Court would not hesitate to declare it invalid. The same end as to commerce is reached by the permissive feature of the Hawes-Cooper Act and the forbidding feature of the Ohio law. The result is the same. The Court's judgment should likewise be the same. Both the Act and the law are necessary parts of the plan and are "but means to an unconstitutional end"—*United States v. Butler,* Jan. 6, 1936. If Congress lacks the power to impose this embargo on Alabama's products unless Alabama selects labor to suit the whims of Congress, and if Ohio lacks the power to stop the sale in Ohio of goods shipped from Alabama in interstate commerce, it is obvious that a combination of the two governments brings no added power to either. The prison products of Alabama are barred from sale in Ohio and in order to overcome that bar, Alabama must change the type of labor in its cotton mills. This cannot be required. Whitfield, the agent, cannot be punished for asserting his rights under the Constitution of the United States to perfect a sale in Ohio in interstate commerce.

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[5]On July 25, 1935 Congress passed an act entitled "An Act to Prohibit the Interstate Transportation of Prison-Made Products in Certain Cases", which prohibits the receipt, possession, sale or use of such products, either in the original package or otherwise, in violation of any law of the State into which they are shipped; requiring all packages containing such products to be labeled, subjecting the same to seizure and forfeiture and imposing a fine of not more than $1,000.00 for violation of the law.

In *Veazie Bank v. Fenno* (1869), 75 U. S. (8 Wall.) 533, 19 L. ed. 482, the Court said that it may be admitted that the reserved rights of the states, such as the right "to employ all necessary agencies for legitimate purposes of state government" are not proper subjects of the taxing power of Congress. 547 (487). Alabama proposes to employ as an agency for the reformation of its convicts manual labor in a cotton mill, which results in the manufacture of cotton products. It proposes to sell those products in interstate commerce. Congress proposes to use its power to regulate commerce to bring about a termination of the employment of this agency by the State of Alabama in order, according to the Senate Report discussed on page 52, herein, to protect labor and industry from what Congress chooses to believe is unfair competition.

In *The Collector v. Day* (1870), 78 U. S. (11 Wall.) 113, 20 L. ed. 122, the Court said that

> " . . . the means and instrumentalities employed for carrying on the operations of their [state and federal] governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government. . . . . " 125 (126)

If the means and instrumentalities of the states cannot be destroyed through the exercise of the taxing power of the federal government, it results that they cannot be destroyed through the exercise of any other power.

> " . . . . any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?" 127 (126-7)

Every addition of power to the general government involves a corresponding diminution of the governmental powers of the states. "It is carved out of them." *Ex Parte Virginia* (1880), 100 U. S. 339, 346, 25 L. ed. 676, 679.

Prior to the adoption of the Constitution the states required no aid from any external authority to manage their domestic affairs. Congress gained no such power under the Constitution. There can obviously be no claim by those insistent on an extension of the powers of Congress that any provision of the Constitution authorizes any interference by Congress with the states in the administration of their governments and the enforcement of their laws with respect to any matter over which jurisdiction was not surrendered to the United States. The states have absolute freedom from all external interference in the exercise of their legislative, judicial and executive authority, all of which are necessarily involved in the trial, conviction, punishment and reformation of one charged with and convicted of a violation of law. Nor can the laws of Ohio extend to Alabama.

> "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on

no one of the others, and is bound to yield its own views to none. . . . "

Kansas v. Colorado (1907), 206 U. S. 46, 97, 51 L. ed. 956, 975.

3.

THE LAW OF OHIO OUTLAWING THE SALE OF PRISON MADE GOODS DEPRIVES PETITIONER OF THE RIGHT TO EARN HIS LIVELIHOOD BY A LAWFUL CALLING, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

The petitioner, Whitfield, was engaged in the sale of cotton shirts. He had chosen to pursue this calling which is not an uncommon occupation. It was protected by the 14th Amendment. *Butchers' Union Company v. Crescent City Company* (1884), 111 U. S. 746, 762, 28 L. ed. 585, 588-9.

In *Allgeyer v. Louisiana* (1897), 165 U. S. 578, 41 L. ed. 832, referring to the 14th Amendment the Court said:

> " . . . The liberty mentioned in that [Fourteenth] Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or

> avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." 589 (835-6)

The right to follow useful occupations is a property right which is protected by the 14th Amendment from impairment or destruction by the state. *Adams, et al. v. Tanner* (1917), 244 U. S. 590, 596-7, 61 L. ed. 1336, 1344; *Meyer v. Nebraska* (1923), 262 U. S. 390, 399, 67 L. ed. 1042, 1045; *Tyson v. Banton* (1927), 273 U. S. 418, 443, 445, 71 L. ed. 718, 728, 729; *Fairmont Creamery Company v. Minnesota* (1927), 274 U. S. 1, 9, 71 L. ed. 893, 897.

The fact that the statute may have been enacted under the claimed police power of the state does not free it from the requirements of the Fourteenth Amendment. *Southern Railway Company v. Virginia* (1933), 290 U. S. 190, 196, 78 L. ed. 260, 265.

4.

THE REPORT OF THE SENATE COMMITTEE ON INTERSTATE COMMERCE.

What is the end or object of the Hawes-Cooper Act? Is it legitimate? Is it within the scope or consistent with the letter and spirit of the Constitution? The end may be tested by the history of the times and the evil which the legislation was intended to remedy. These are plainly indicated by the Committee Report [S. Rept. No. 344,

70th Cong., 1st Sess., see Senate Reports, Vol. 1, same session].

Andrew Aldridge v. Nathaniel F. Williams (1845), 44 U. S. (3 How.) 9, 24, 11 L. ed. 469, 476

United States v. Union Pacific Railroad Company (1875), 91 U. S. 72, 79, 23 L. ed. 224, 228

American Net and Twine Company v. Roland Worthington (1891), 141 U. S. 468, 473-4, 35 L. ed. 821, 824

Church of the Holy Trinity v. United States (1892), 143 U. S. 457, 465, 36 L. ed. 226, 230

Joseph R. Binns v. United States (1904), 194 U. S. 486, 495-6, 48 L. ed. 1087, 1090-1

Standard Oil Company of New Jersey v. United States (1910), 221 U. S. 1, 50, 55 L. ed. 619, 641

Duplex Printing Press Co. v. Emil J. Deering (1921), 254 U. S. 443, 474-5, 65 L. ed. 349, 360

Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co. (1922), 257 U. S. 563, 588-9, 66 L. ed. 371, 383

George Van Camp & Sons Company v. American Can Company and the Van Camp Packing Company, Inc. (1929), 278 U. S. 245, 253-4, 73 L. ed. 311, 313

Federal Trade Commission v. Raladam Company (1931), 283 U. S. 643, 650-1, 75 L. ed. 1324, 1330-1

Although admitting that the penitentiary problem is a problem for the state, that

> "the factors that enter into its adjustment are so many and so varied as to make it essentially a State problem, and no Federal impediment should

> stand in the way of any State which seeks to determine its own prison affairs and the regulation of the sale of prison products,"

the report proceeds frankly to outline for the states a solution of their problems. An analysis of the report shows that the principal evil sought to be remedied was the competition of prison products with those of free labor, and the competition of prison industries with those of manufacturers representing more than two billion, five hundred million dollars in investments. The General Federation of Women's Clubs was brought into the situation. The Federation was interested in bringing about "a proper reform in the prisons of the Nation" which the report stated was being frustrated by the inability of states to make effective their local laws burdening the sale of prison-made products shipped in interstate commerce. Pertinent paragraphs from the committee report are as follows:

> *"Supported by Three Great Elements of Society*
>
> "Three distinct and powerful elements in American life earnestly indorsed this measure, each from a separate motive and different viewpoint.
>
> "The American Federation of Labor urged the passage of this bill through its properly constituted leaders, and has without exception indorsed the measure through its State organizations. (P. 1)[6]
>
> "The viewpoint of labor is that under existing conditions the products of convicts are permitted to flow through channels that bring about a ruin-

[6]References are to an official copy of the report contained in Senate Reports, Vol. I, 70th Cong. 1st. Sess.

ous competition with the labor of free American citizens, 5,000,000 of whom the labor organization represents.

"From an entirely different viewpoint manufacturers, representing more than $2,500,000,000 in investments and employing both union and nonunion labor, were heard by the committee urging the passage of the measure for the reason, they stated, that under existing conditions the continuous production of prison-made products in certain centralized industries creates a condition by which the entire competitive market is demoralized and under which the products of free manufacturers are forced into ruinous competition with goods made by convicts.

"Wholly aside from these divergent reasons, the General Federation of Women's Clubs, through their properly constituted representatives, and speaking for some 14,000 affiliated branches in the 48 States, urged before the committee the passage of this act on the broad humanitarian ground that under existing conditions all attempts to bring about a proper reform in the prisons of the Nation were being frustrated by the legal impediment under which State laws are made ineffective through interstate commerce.

"The blind also appeared, through properly authorized representative of the national organization looking to the betterment of conditions for the blind, in support of this measure. It was brought out that convict labor is dominating the broom industry, which industry is the best suited for those so afflicted.

"In addition to these were representatives of the prison reform organizations with branches in the States.

"It is significant that all five of these elements declared that their ultimate object was the same, to wit, the continuous employment of the convict for the benefit of the State, for his own welfare, and rehabilitation,[7] and for the care of his family, and the removal of his products from the field of ruinous competition with both free labor and invested capital." (P. 2)

* * * * *

"That prisoners must be employed is one of the principles upon which this bill is founded. As a result of the passage of this measure the prisoner of the future may not only be employed but may be employed in such a way as to bring about, through scientific methods, his possible rehabilitation for reentrance into society."

" 'State Use' and 'States' Use' Plans

"Testimony was given to the committee concerning the State-use system now in existence in some of the larger States of the Union, and in each case conditions under such system were found satisfactory.

"The State-use system is that under which the products of convict labor are diversified with the view to the needs of State institutions, the thought being that under proper surveys as to such needs

[7]For a vivid picture of the "corroding idleness" existing today among prison population as a result of the Hawes-Cooper Act and under the codification of industry, see American Prisons—Houses of Idleness, by James V. Bennett, Assistant Director of Bureau of United States Prisons, published in The Survey, April, 1935, p. 99.

and under proper diversification of industry in the prisons the output of the penitentiaries will meet the needs of the institutions of the State.

"But in addition to the thought underlying the State-use system there was outlined to your committee the States' use plan under which products of a prison in one State may be sold to the institutions of another State, and under a systematic prison management the industries of certain States would be diversified to meet the requirements of certain other nearby States. Such diversification would be based not only upon the needs of adjoining States but upon the proximity of raw materials as well. Such a system also takes into consideration the employment of prisoners in a given State in such industries as will prove most beneficial to the prisoners when paroled or released in that State. But whatever the State or groups of States may do is not the province of this bill, which simply enables them to do as they please. (P. 3)"

The report pays its respects to the evils of prison contracts, with which of course Congress has nothing to do. The contractor

> "is the middleman profiting both from the State and the prisoner. He should be eliminated as a factor in the prison problem. (P. 3)

* * * * * *

"The bill therefore does not interfere with the rights of States, but it does assist in preserving the right of self-determination for each State.

" . . . . the control and direction of prisoners should not be delegated to anyone except responsible officials of the State, and no contractor or selling agency should have anything to do, di-

rectly or indirectly, at any time with the prisoners' supervision. (P. 4)

* * * * * *

"The disparity in wages paid prisoners and those paid free labor need not be discussed, as the facts borne out by testimony are matters of common knowledge.

* * * * * *

"Two Years Given for Readjustment

"The committee is not unmindful of the practical problem presented in certain States of the necessity of changing present systems. It is this practical problem to which the conscientious wardens and prison officials who appeared before the committee will have to give their attention. It is much the simpler program to go on as at present. To change means the employment of time and study in the reorganization of prison management.

"Realizing this the committee amended the bill as introduced by providing that it shall not take effect until two years from date of passage.

"This amendment meets the desires of those who favor the principle of the bill, but who are anxious for time necessary to meet the practical problem in their own State.

"The 2-year clause in the bill will make it possible for the prison management of any State to make such surveys and such reorganization as may be necessary.

"This bill is a necessary step in a national program of prison reorganization which began some

years ago with the abolition in a majority of States of the obnoxious contract system, but which has been delayed and hampered by the existence of the legal impediment to which reference has been made.

"In those States where the more modern system of prison employment has been adopted through legislative enactment, prison officials reported to the committee that representatives of the General Federation of Women's Clubs, the American Federation of Labor, and the manufacturers had been cooperating to make the new system effective.

"The same zeal and activity on the part of these three elements of American life may be confidently relied upon in the future to assist the Government of any State in which the people are desirous of putting into effect a new system of penal conduct." (P. 5)

From a document of directors of penal institutions accompanying the report we observe that:

"It is estimated that the amount of goods produced by convict labor represents not more than one-twentieth of one per cent of the products of outside labor—the amount of the competition is infinitesimally small." (Congressional Record 70th Congress, 2nd sess., Vol. 70, Pt. 1, p. 677, 2nd Col. Lines 20-24.)

Thus the power of the Government of the United States is invoked to protect free labor and the billions of invested capital from the labor of the prisoner. Shall we see the day when this protection renders a sentence to hard labor impossible of enforcement?

CONCLUSION

The law of Ohio forbidding the sale of prison-made goods, unsupported by the Hawes-Cooper Act, would doubtless have been declared invalid by the Supreme Court of Ohio, as was a kindred statute in the case of *Arnold v. Yanders,* supra. But what the state lacked the power to do when that case came before the court, Congress could not give it the power to do in 1934 by passing the Hawes-Cooper Act.

The judgment of the Supreme Court of Ohio should therefore be reversed, the petitioner Whitfield ordered discharged, and the several states freed to reorganize and reconstruct their systems so as to put their prisoners to work, after the confusion which they have lately suffered as a result of the invalid attempt on the part of Congress to interfere in the regulation of such important local, governmental activities.

Respectfully submitted,

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